Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO N–02–802 OF 1997
NH CHAN, MOKHTAR SIDIN AND HAIDAR JJCA
23 JULY 1998

Civil Procedure *— Injunction — Mareva injunction — Requirements for grant of Mareva injunction — Grounds of good arguable case and real risk that assets would be dissipated or removed before judgment — Whether trial judge had wrongly exercised his discretion when he ordered grant of Mareva injunction*

The second, third and fourth appellants ('the appellants') are the directors of the first appellant company ('the company'). The first respondent alleged that the appellants had entered into an oral agreement with him whereby, inter alia — for a certain consideration — he was to obtain an approval for the amalgamation, change of condition and sub-division of certain lands ('the lands') belonging to the company. The first respondent contended that through his efforts, the State Exco did on 30 May 1995 approve the company's application and therefore the first respondent had fulfilled his obligation under the oral agreement. The appellants, however, contended that it was the company that had successfully obtained the approval from the State Exco. The first respondent claimed for the specific performance of the alleged oral agreement. Upon the respondents' application, the learned judge, inter alia, granted a Mareva injunction. The appellants appealed.

Held, allowing the appeal:

The learned judge had fallen into error in considering the ground of good arguable case before granting the Mareva injunction. Furthermore, the learned judge also fell into error by not addressing and evaluating the evidence before him in considering whether there was a real risk that the assets will be dissipated or removed before judgment (see pp 6H and 7F). This, therefore, would be a proper case which required this court's interference as the learned judge had wrongly exercised his discretion when he made the order of Mareva injunction in favour of the respondents (see p 7G).

[Bahasa Malaysia summary

Perayu kedua, ketiga dan keempat ('perayu-perayu') adalah pengarah-pengarah syarikat perayu pertama ('syarikat tersebut'). Penentang pertama mengatakan bahawa perayu-perayu telah mengikat suatu perjanjian lisan dengannya di mana, antara lain — untuk balasan tertentu — ia hendaklah memperolehi kelulusan untuk penyatuan, penukaran keadaan dan pecah lot tanah-tanah tertentu ('tanah

tersebut') kepunyaan syarikat tersebut. Penentang pertama menghujahkan bahawa menerusi usahanya, Exco Negeri telah pada 30 Mei 1995 meluluskan permohonan syarikat tersebut dan maka penentang pertama telah memenuhi obligasinya di bawah perjanjian lisan itu. Namun demikian, perayu-perayu berhujah bahawa syarikat tersebut yang telah berjaya memperolehi kelulusan daripada Exco Negeri. Penentang pertama menuntut pelaksanaan spesifik atas perjanjian lisan yang dikatakan. Atas permohonan penentang-penentang, antara lain, hakim yang arif telah memberikan injunksi Mareva. Perayu-perayu membuat rayuan.

Diputuskan, membenarkan rayuan:

Hakim yang arif terkhilaf dalam mempertimbangkan alasan kes yang kukuh dan boleh dihujahkan sebelum memberikan injunksi Mareva. Tambahan pula, hakim yang arif juga terkhilaf dengan tidak menumpukan perhatian terhadap dan menilai keterangan di hadapan beliau dalam mempertimbangkan sama ada tedapat suatu risiko sebenar bahawa aset-aset akan dilupuskan atau dialihkan sebelum penghakiman (lihat ms 6H dan 7F). Maka, ini adalah suatu kes wajar yang memerlukan gangguan dari mahkamah ini kerana hakim yang arif telah salah laksana budi bicara beliau ketika membuat perintah injunksi Mareva memihak kepada penentang-penentang (lihat ms 7G).]

Notes

For cases on Mareva injunction, see 2(1). *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2255–2309.

Cases referred to

Creative Furnishing Sdn Bhd v Wong Koi [1989] 2 MLJ 153 (refd)

Mareva Compania Naviera SA v International Bulkcarriers SA; The Mareva [1980] 1 All ER 213 (refd)

Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen [1984] 1 All ER 398, on appeal [1984] 1 All ER 413; [1983] 1 WLR 1412 (refd)

S & F International Ltd v Trans-Con Engineering Sdn Bhd [1985] 1 MLJ 62 (refd)

Appeal from: Civil Suit No 22–57 of 1995 (High Court, Seremban)

Yusof Khan (*M Thomas Philip* with him) (*Thomas Philip Kwa & Lou*) for the appellants.

Christopher Fernando (*Mahenderan* with him) (*Aris Rizal Christopher Fernando*) for the respondents.

Haidar JCA (delivering judgment of the court): In this suit, the respondents ('the plaintiffs') filed two applications (encls 52 and 60) in the court below.

In respect of encl 52, the learned judge granted the application for a Mareva injunction and ordered that a sum of RM1.7m be deposited in a bank under the joint-account of the solicitors for the respondents and the solicitors for the appellants until the disposal of this suit. This was on the premise that the lands belonging to the first appellant company had been sold when encl 52 was heard.

The appellants appealed against this order (Civil Appeal No N–02–802–97), that is, the appeal before us.

In respect of encl 60, the learned judge dismissed the application for the return of the grants of titles for Lot 2330 to Lot 2334, Mukim Setul, Negeri Sembilan Darul Khusus owned by the second respondent and deposited with the appellants as security by the first respondent.

The respondents appealed against his order (Civil Appeal No N–02–3–96).

The two orders made in respect of encls 52 and 60 are embodied in one order of the court dated 5 December 1997 (see the supplementary record).

When we allowed the appeal before us and set aside the order of the learned judge, the counsel for the respondents, as appellants, in Civil Appeal No N–02–3–96 withdrew their appeal and prayed that no order as to costs be made against them. However, the counsel for the appellants, as respondents, in Civil Appeal No N–02–3–96 pressed for costs in any event.

We dismissed Appeal No N–02–3–96 and in the exercise of our discretion, made no order as to costs. We ordered the deposit to be refunded.

We now give our reasons for the order made in Appeal No N–02–802–97 before us.

Brief facts

In this suit, the first respondent alleged that on or about February or March 1992, the second, third and fourth appellants entered into an oral agreement with him whereby he was informed that he was appointed the chairman for the first appellant company and it was his duty to ensure approval is obtained from the State Exco Negeri Sembilan Darul Khusus for the amalgamation, change of condition and sub-division of Lots 1162, 1353, 1671, 1673, 1674, 3327 and 3328 Mukim Setul Daerah Seremban ('the said lands') belonging to the first appellant company. The said lands were originally under the category 'agriculture'. It is not disputed that a letter of appointment of the first respondent as chairman of the first appellant company dated 16 March 1992 was issued to him (p 543 of the record, Vol 4). It is to be noted that the authority given was to obtain approval for the conversion of the said lands to 'industry'.

The second, third and fourth appellants are directors of the first appellant company.

The second, third and fourth appellants, according to the first respondent, orally agreed to pay him the sum of RM1.7m if he was

successful in obtaining the said approval and also to transfer 337,917 shares in the first appellant company to him. At the same time, grants of titles for Lot 2330 to Lot 2334 Mukim Setul, Negeri Sembilan Darul Khusus owned by the second respondent (first respondent's mother) were deposited with the appellants as security by the first respondent. However, the appellants contended that the deposit of those grants of titles belonging to the second respondent was for a loan of RM650,000 given to the first respondent by the appellants.

The first respondent contended that through his efforts, the State Exco Negeri Sembilan Darul Khusus did on 30 May 1995 approve the first appellant company's application for amalgamation, change of condition and sub-division of the said lands to housing and therefore the first respondent has fulfilled his obligation under the oral agreement.

The appellants, however, contended that the first respondent was not successful in getting the said lands converted to housing. It was the contention of the first appellant company that it was the one who successfully obtained the approval for conversion of the said lands to housing from the State Exco of Negeri Sembilan Darul Khusus.

In this suit, the first respondent claims, inter alia, for the specific performance of the alleged oral agreement by the appellants for the payment of RM1.7m and the transfer of 337,917 shares (said to be worth RM6,571,486.50) to him.

The law

The order known as a Mareva injunction — so named after the case of *Mareva Compania Naviera SA v International Bulkcarriers SA; The Mareva* [1980] 1 All ER 213 is a species of interlocutory injunction which restrains a defendant by himself or by his agents or servants or otherwise from removing from the jurisdiction or disposing of or dealing with those of his assets that will or may be necessary to meet a plaintiff's pending claim.

The Supreme Court in *Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153 sets out the requirements the respondents must satisfy the court in order to get a Mareva injunction. On the facts of the appeal before us, the respondents must satisfy the court, first that they had a good arguable case; secondly, that the first appellant had assets within the jurisdiction, and thirdly, that there was a real risk of the assets being dissipated or removed before judgment in that there must be solid evidence to establish the risk.

In considering the issue in this appeal before us, that is, the exercise of the discretionary power vested in the High Court judge, we should bear in mind the cautionary words of the Federal Court in *S & F International Ltd v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62 where at p 64D, Abdoolcader FJ stated:

> We should perhaps also reiterate and stress the point that the discretion whether or not to grant an interlocutory injunction is vested in the High Court judge and not the appellate court whose function initially is one of

A review only, and it will not overrule the decision of the judge at first instance unless, broadly speaking, he has made an error of law or misconceived the facts, and except in those circumstances it must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently ... .

B It is not disputed that the first appellant company's only asset within the jurisdiction is the proceeds of sale of the said lands which amounted to RM59,060,455.75 in which a deposit of RM5,906,045.57 was paid to the first appellant company (see p 208 of the record, Vol 2). The said lands were sold to Megatime Enterprise Sdn Bhd.

C In that event, we should consider only the following grounds: (i) the good arguable case; and (ii) real risk of the assets being dissipated or removed before judgment, in this appeal. The learned judge also considered these two grounds in his judgment.

D *Good arguable case*

What is a good arguable case is difficult to define. The respondents need not show that they have a case so strong as to warrant summary judgment nor even a strong prima facie case. It would generally be sufficient if the respondents can show on the evidence available, there is a fair chance that E they will obtain judgment against the appellants (see *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen* [1984] 1 All ER 398, on appeal to CA [1984] 1 All ER 413; [1983] 1 WLR 1412).

In his judgment, the learned judge relied on the following evidence to determine whether there is a the ground of good arguable case.

F He referred to exh A-5, that is, a letter dated 16 March 1992 from the appellants whereby the first respondent was given the authority to liaise with the relevant departments to obtain the approval for the conversion of the said lands to industrial and exh 'A-8', that is, the approval from the Secretary of the State Exco of Negeri Sembilan Darul Khusus to first appellant company whereby the State Exco at its meeting on 30 May 1995 G approved the application for conversion from agriculture to housing. According to the learned judge, the letter (exh 'A-8') was in reply to the appeal made through the first respondent's letter dated 29 April 1994 and confirmed by the District Land Administrator, Seremban vide his letter date 29 August 1995 (exh 'A-9').

H Regretably, the learned judge failed to consider at all the evidence of the appellants.

The learned judge should have critically evaluated the following evidence.

I (i) Exhibit 'A-5' gave authority to the first respondent for a period of six months only. The approval was obtained beyond the said period.

(ii) The approval obtained was for conversion to housing whereas the authority given to the first respondent was for conversion to industry.

(iii) Exhibit 'A-8' was addressed to the first appellant company and no reference was made to the letter of appeal purportedly made by the first respondent.

(iv) Exhibit 'A-8' was certified as the original copy that was in the possession of the first appellant company (it was not a certified true copy). This is fortified by the confirmation of the Secretary of the State Exco (En Ramli bin Mohd Noor) (p 813 of the record, Vol 4) that it was not true that the first respondent was given the letter of approval by him (En Ramli bin Mohd Noor). This was in response to the letter to him (p 811 of the record, Vol 4).

The appellants also attacked on the lack of particulars in the statement of claim of the respondents and this was not considered by the learned judge. For instance, nowhere in the statement of claim is pleaded regarding the conversion of the said lands from agriculture to industry and finally to housing. It was left open. This is a material fact that should be pleaded by the respondents. In this respect, Abdoolcader FJ in *S & F International Ltd v Trans-Con Engineering Sdn Bhd* said at p 66:

> ... We would en passant observe that a Mareva application must necessarily in respect of the claim on which it is premised relate to the pleading of the plaintiff in the action instituted and even if it is sought to remedy the position by affidavit, it would make no difference as any defect or omission in a statement of claim cannot be made good by affidavit evidence: *Gold Ores Reduction Co v Parr* [1892] 2 QB 14 where Mathew J said that: 'it is most important that a defendant should know from the writ what the exact claim against him is'; this case was followed and applied by this court in *United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 at p 207.

There were of course allegations and counter-allegations by both parties that some documents were forged. This is a matter of evidence at the trial proper.

Suffice to say that, if the learned judge had given a close and proper scrutiny to the evidence before him, in balancing the case of the respondents and the appellants, it would show that the respondents did not show that they had a good arguable case.

In any event, as stated earlier, the learned judge failed to consider at all the evidence of the appellants as reflected in his judgment. Clearly therefore, the learned judge fell into error in considering the ground of good arguable case.

Even assuming that the respondents had shown a good arguable case, the respondents would still have to satisfy the court that there is a real risk that the assets will be dissipated or removed before judgment.

Real risk of the assets being dissipated or removed before judgment

PCW (Underwriting Agencies) Ltd v Dixon & Anor [1983] 2 All ER 158 (CA); [1983] 2 All ER 697 (quoted with approval in *S & F International Ltd v Trans-con Engineering Sdn Bhd*) sets out the policy underlying a

Mareva injunction, where it was held that the sole purpose of a Mareva injunction was to prevent a plaintiff from being cheated out of the proceeds of an action, should he be successful, by a defendant transferring his assets abroad or dissipating the assets within the jurisdiction, and that the remedy was not intended to give a plaintiff priority over those assets, or to prevent a defendant from paying his debts as they fell due, or to punish him for his alleged misdeeds, or to enable a plaintiff to exert pressure on him to settle an action.

The learned judge in his judgment, quite apart from citing the case of *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213, failed again to consider at all whether 'there was a real risk of the assets being dissipated or removed before judgment'.

From the evidence disclosed, it would appear that the respondents' fear was that the second to fourth appellants might utilize the proceeds of the sale and also wound up the first appellant company thereby depriving the respondents of the fruits of the judgment should they be successful in the action.

On the other hand, the appellants contended that the sale of the said lands was a good deal and in the best interests of the shareholders of the first appellant company. There was no evidence by the respondents to show otherwise other than their alleged fear.

In addition, the first appellant company had a paid up capital of RM2,252,780 and the second to fourth appellants deposed that they had sufficient assets within the jurisdiction (see p 266 of the record, Vol 2). The respondents did not seem to dispute the evidence.

In the circumstances, we were of the opinion that the learned judge fell into error by not addressing and evaluating the evidence before him in considering whether there was a real risk that the assets will be dissipated or removed before judgment.

For the reasons stated, this would be a proper case which requires our interference as clearly the learned judge made an error of law and misconceived the facts before him in the exercise of his discretion when he made the order of Mareva injunction in favour of the respondents.

The appeal was allowed with costs here and below. Order of the court below set side. Deposit to be refunded to the appellants.

Appeal allowed.

Reported by Loo Lai Mee